

HE (Migration) [2024] ARTA 844 (20 November 2024)

Decision and

Reasons for Decision

Applicant: Mr Jinling HE

Respondent: Minister for Home Affairs

Tribunal Number: 2305955

Tribunal: Senior Member G. Cullen

Place: Sydney

Date: 20 November 2024

1. **Decision:** The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.
- 2.

Statement made on 20 November 2024 at 10:14am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – identity documents – proceedings can be adequately determined without hearing – claims against education agent – financial hardship – impact on employer – decision under review affirmed

LEGISLATION

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth)
Administrative Review Tribunal Act 2024 (Cth), s 106
Migration Act 1958 (Cth), ss 5(1), 65
Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Sran v MIBP [2014] FCCA 37

Statement of reasons

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 12 April 2023 to refuse to grant the visa applicant a Student (Temporary) (Class TU) Subclass 500 visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because he did not meet Public Interest Criterion 4020 (PIC 4020) as he had given or caused to be given a bogus document.
5. Specifically, the delegate noted that on 11 July 2018 the applicant was granted a Student visa valid to 10 March 2021. When applying for this visa in 2018 he provided a copy of his National ID card with number 350111199601055273. In August 2022, the Department contacted a representative of the Pingtan County Public Security Bureau who advised that the National ID card with number 350111199601055273 could not be found in the household registration system.
6. On 9 March 2023, the Department sent to the applicant an invitation to comment on the above-mentioned adverse information received raising with him that there is evidence suggesting he has provided, or caused to be provided, a bogus document which would result in a failure to satisfy PIC 4020(1). The delegate also referred to PIC 4020(4) and requested information as to whether the requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the visa.
7. On 4 April 2023 the applicant responded that the number is not his ID number but he trusted his family and the agency. He also provided submissions as to the waiver provision outlined in PIC 4020(4).
8. Following the refusal by the delegate on 12 April 2023, the applicant lodged an application for review of the delegate's decision with the former Administrative Appeals Tribunal (the AAT) on 30 April 2024.
9. On 14 October 2024, the AAT became the Administrative Review Tribunal (the Tribunal). Under the transitional provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (the Transitional Act), applications for review to the AAT that were not finalised before 14 October 2024 are taken to be an application for review to the Tribunal. The Transitional Act gives the Tribunal the authority to continue and finalise any aspect of the review not already completed by the AAT. This decision and statement of reasons is made by the Tribunal.
10. On 30 July 2024 the applicant was invited to attend a hearing via video on 3 September 2024.
11. On 5 August 2024 and 8 August 2024 he requested that his case be held in Sydney as an in-person hearing.

12. His request was accepted and the matter was reconstituted to a member in Sydney and on 23 September 2024 he was invited to attend an in-person hearing on 4 November 2024. The hearing invitation letter noted that the Tribunal had considered the material before it but is unable to make a favourable decision on the information before it. The hearing was an opportunity for the applicant to further present his claims and evidence.
13. On 2 November 2024 the applicant submitted a completed Response to Hearing Invitation form in which he indicated that he did not want to have a hearing and he consents to the Tribunal making a decision on the papers without inviting him to a hearing. The form noted that if the applicant does not want a hearing the decision will be made based on the information and evidence before the Tribunal. No additional evidence to that already provided was submitted or included.
14. As the applicant submitted yes in the Response to Hearing Invitation form that he needs a Chinese interpreter to participate in the hearing on 4 November 2024 the Tribunal requested in writing that he confirm that he does not wish to attend the hearing on 4 November 2024 at 11.30am. It requested he confirm that he is requesting the Tribunal to make a decision without holding the hearing. He responded in writing confirming that he wishes the Tribunal to make a decision without holding a hearing.

15. Decision without a Hearing

16. The Tribunal for the reasons that follow has decided to make a decision without a hearing. Section 106 of the *Administrative Review Tribunal Act 2024* (Cth) (the ART Act) outlines the circumstances in which the Tribunal may make a decision without a hearing.
17. Section 106(3)(b)(ii) of the ART Act provides that the Tribunal may make a decision without holding a hearing if the applicant requests the Tribunal to do so. In this matter the applicant was invited to attend a hearing to give evidence and present arguments. The hearing invitation letter noted that the Tribunal had considered the material before it but is unable to make a favourable decision on the information before it. This was an opportunity for the applicant to provide further evidence and information. He did not take up that opportunity. Instead, he consented to a decision being made without appearing and later to the Tribunal making a decision without holding a hearing. The Tribunal accepts it is a request to make a decision without holding a hearing. The Tribunal is therefore satisfied that the information provided in the response to hearing invitation form and his written email received on 4 November 2024 indicates the applicant has made a request to make a decision without holding the hearing of a proceeding within the meaning of s 106(3)(b)(ii) of the ART Act .
18. However, under section 106(3)(c) the Tribunal may only make a decision without holding a hearing if it appears to the Tribunal that the issues for determination in the proceedings can be adequately determined in the absence of the parties to the proceeding.
19. The Tribunal has considered that the applicant has been provided with an opportunity as outlined above by the Department to provide further evidence and information. He took up the opportunity. He was invited to attend a hearing to give evidence and present arguments. The hearing invitation letter noted that the Tribunal had considered the material before it but is unable to make a favourable decision on the information before it. This was an opportunity for him to further present his case and to provide further evidence. He chose not to attend. He confirmed he was requesting a decision be made without a hearing. He provided no further information and the Tribunal is of the view he has requested a decision on what was already before the Tribunal. The Tribunal is of the view there is nothing further relevant or material that he wishes the Tribunal to consider. For these reasons it finds that the issues for determination in the proceeding can be adequately determined in the absence of the parties to the proceeding.

20. **Section 376 certificate of non-disclosure**

21. A certificate was issued by the Minister for Immigration under s 376 of the Act certifying that disclosure of certain documents on his file would be contrary to the public interest.
22. On 31 July 2024 the Tribunal wrote to the applicant attaching a copy of the certificate, advising him that it considered the certificate to be valid, inviting him to comment on its validity, and on whether it should exercise its discretion to disclose the documents to him. It attached the s 376 certificate. The applicant responded that he has no information about this matter and is unsure about its validity. He asked the Tribunal to disclose the details.
23. The information covered is the Department notes as to the assessment of the visa criterion. As there is nothing in these notes other than what is already outlined in the Department decision, the Tribunal has decided not to disclose the information to him.

CONSIDERATION OF CLAIMS AND EVIDENCE

24. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
25. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate circumstances justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

26. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no

requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

27. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
28. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) because he did not meet PIC 4020 as he had given or caused to be given a bogus document.
29. On 11 July 2018 the applicant was granted a Student visa valid to 10 March 2021. This visa was held in the 12 months before the current application was made on 8 March 2021. When applying for this visa in 2018 he provided a copy of his National ID card with number 350111199601055273. In August 2022 the Department contacted a representative of the Pingtan County Public Security Bureau who advised that national identity card number 350111199601055273 could not be found in the household registration system. The applicant advised that the ID number provided in his 2018 application is not his. He did not dispute in his response to the Department that the National ID card with number 350111199601055273 is not his. The Tribunal finds the National ID card with number 350111199601055273 is a bogus document within the meaning of s 5(1)(b), as it reasonably suspects it is counterfeit, being an imitation designed to pass as an original; a forgery.
30. As to whether the applicant has given or caused to be given a bogus document to the Department, he submitted that while accepting the ID card was not his it was not deliberate. He wrote that he fully trusted his family and the agency. He wrote that the agency and his parents filled in the application on his behalf and he thought it was legal. He claimed he was young and ignorant, and he did not check the information in the application. He claimed he was not aware that the agency wrote the wrong number. When informed he contacted his parents immediately who advised that they provided the agency with his degree, ID card, household registration book, and deposit information, and paid the corresponding money. He claimed his parents have contacted the agency many times to ask for an explanation for the wrong ID number. He suspects that the agency was dealing with so many customers that it confused the information. The agency did not respond to his parent's outreach and later his parents came to know they went bankrupt. He no longer can ask the agency to prove they gave false information.
31. The Tribunal is of the view the applicant had little concern or interest in what information and documents were being provided. On the evidence before it, the Tribunal is satisfied that the applicant had authorised the agent and his parents to act on his behalf and relied entirely on the agent to take care of the application without checking or verifying what was being lodged on his behalf. The Tribunal is satisfied that an agency agreement was established between the applicant and the agent, and he was indifferent as to the detail of the application and the attached document such that the scope of the authority was broad enough to include the provision of a bogus document to the Department¹. The evidence of the applicant indicates he was indifferent as to the detail of the application made in 2018 and supporting documents submitted including the National ID card with number 350111199601055273 in the name of the applicant. It is not necessary that an applicant was aware that false information was given by an agent, or that the applicant gave instructions to the agent to provide false information. The Tribunal is satisfied on the evidence that the applicant caused the bogus

¹*Sran v MIBP* [2014] FCCA 37

document to be given with indifference and therefore he has given or caused to be given a bogus document to the Department.

32. The Tribunal has considered his claim he was young and ignorant but notes he was over 18 at the time and it does not accept this changes the finding that he has given or caused to be given a bogus document.
33. He has since provided to the Tribunal evidence of a genuine ID number. However, the provision of genuine information or document does not alter the initial provision of a bogus document.
34. Therefore, having regard to the information and evidence above, the Tribunal therefore finds that the applicant has given or caused to be given to the Department a bogus document withing the meaning of s5(1), being his National ID card with number 350111199601055273 in relation to a visa that the applicant held in the 12 months before the application was made.
35. Therefore, the applicant does not meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

36. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
37. There is no evidence before the Tribunal that the applicant has been refused a visa in the relevant period. There is no relevant member of his family unit included in the visa application.
38. Therefore, PIC 4020(2) is met.

Should the requirements of PIC 4020(1) or (2) be waived?

39. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
40. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
41. The applicant referred to in the submission submitted in April 2023 to completing a General English course, Diploma of Business, and Advanced Diploma of Business, and developing a strong interest in marketing. He submitted that studying marketing will assist in his future career planning and advised he is taking courses at Training Masters, which will end in August. He advised that during the pandemic, due to lockdown and taking online classes at home he did not complete his assignments on time. He claimed he is now actively finalising his assignments and plans to obtain his diploma. He submitted that if his visa is denied, he

will have to end his course and return to China. He claimed the marketing program in China requires a bachelor's degree or higher, and he would not have such a degree and he would need to take the college entrance examination or a self-educated undergraduate program for adults, which would seriously delay his employment plan for a very long time. He submitted that if he could not complete his study in Australia, he would have great difficulty finding a job in the fierce job market of China. He submitted that he has already spent a huge amount of money studying in Australia and that would be lost. He requested the Tribunal consider his situation and give him a chance to complete his courses and find a suitable job in Australia.

42. He also claimed that the construction industry in Australia is very short of talent because of the high level of skill and experience required in this industry, as well as the need to work outdoors and in high places. This has resulted in many people not being willing to work in this industry. He submitted that the Australian construction industry needs more workers to meet the market demand. Many projects fail to be completed on time due to staff shortages. As a construction apprentice, he has undergone lengthy training and can now do some of the work on interior decoration independently. If his visa is denied, it would be a big blow to his employer as they would have difficulty finding an alternative in the short term or would need to pay higher salaries to attract employees, but this could lead to higher costs for the company, which in turn could affect profitability. More importantly, it can result in projects not being completed on time. He submitted that the beneficiaries of their projects are all Australian citizens and permanent residents.
43. He noted he has not been home for a long time because of the pandemic, he misses his family and he plans to return to his hometown and look for a marketing related job. During the pandemic in China, many companies went offline to online, and live-streaming marketing is very popular in all industries. The courses on e-marketing he completed, such as how to develop e-marketing plans, how to maximise brand effectiveness, and how to double sales by developing e-channels will correspond with e-marketing jobs in China, and it should not be difficult to find a job when he returns to China.
44. He also submitted evidence he was awarded the Diploma and Advanced Diploma of Business on 15 February 2021 and completed the General English course in 2018.
45. As to the effects the refusal would have on him personally, including his study and future career prospects the Tribunal is not satisfied that this amounts to compelling circumstances affecting Australia's interests, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
46. As to the effects the refusal would have on the construction industry as he is a construction apprentice and this industry is short on talent and people, including the effects on his employer, projects not being completed on time and the effects on Australian citizens and permanent residents; on the evidence before it the Tribunal is not satisfied that this amounts to compelling circumstances affecting Australia's interests, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
47. For the above reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4).
48. Based on the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

DECISION

49. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...